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No. 90-1464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

VOLKSWAGEN OF AMERICA, INC., ET AL.,
PETITIONERS

v.

DOUG ROY, JR., ET AL.,
RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2 of the Rules of this Court, the Product Liability Advisory Council, Inc. ("PLAC"), respectfully requests leave to file the accompanying brief as *amicus curiae* in support of petitioners. Counsel for petitioners has consented to the filing of this brief, but counsel for respondents has declined consent.

PLAC is a non-profit membership association of approximately 80 major industrial companies.[1] Formed in 1983,

[1] PLAC members include: American Home Products Corporation; American Telephone & Telegraph Company; Amoco Corporation; Amsted Industries, Inc.; Anheuser-Busch Companies, Inc.; Association of International Automobile Manufacturers, Inc.; The Boeing

(Footnote continued on following page)

PLAC's principal purpose is to submit briefs as *amicus curiae* in appellate cases involving significant issues affecting the law of product liability. PLAC has participated as *amicus curiae* in numerous cases in this Court, the federal courts of appeals, and state appellate courts.

PLAC and its members have a strong interest in the development of sound legal principles governing procedural and substantive issues arising in product liability

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[1] *continued*

Company; Bridgestone/Firestone, Inc.; The Budd Company; Caterpillar, Inc.; Chrysler Corporation; Clark Material Handling Company; The Coca-Cola Company; The Coleman Company; Dana Corporation; Deere & Company; Defense Research Institute; Digital Equipment Corporation; Dow Chemical Company; Eaton Corporation; Exxon Corporation; FMC Corporation; Federal-Mogul Corporation; Ford Motor Company; Freightliner; The Gates Corporation; General Electric Company; General Motors Corporation; Goodyear Tire & Rubber Company; Gravely International, Inc.; Great Dane Trailers, Inc.; Harnischfeger Industries, Inc.; Hoechst Celanese; Honda North America, Inc.; Hyundai Motor America; Ingersoll-Rand Company; Isuzu Motors, America, Inc.; Johnson Controls, Inc.; Joy Technologies, Inc.; Kawasaki Motors Corp., U.S.A.; Eli Lilly and Company; Melroe Company; Mercedes-Benz of North America, Inc.; Merck & Company, Inc.; Michelin Tire Corporation; Miller Brewing Company; Minnesota Mining and Manufacturing Company; Mitsubishi Motor Sales of America; Monsanto Company; O.F. Mossberg & Sons, Inc.; Motor Vehicle Manufacturers Association of the United States, Inc.; Navistar International Transportation Corp.; New United Motor Manufacturing, Inc.; Nissan Motor Corporation, U.S.A.; Otis Elevator Company; PACCAR, Inc.; Philip Morris Companies, Inc.; Piper Aircraft Corporation; Pirelli Armstrong Tire Corporation; Playtex Family Products Corp., Inc.; Porsche Cars North America, Inc.; Procter & Gamble Company; RJR Nabisco, Inc.; Rockwell International; Schindler Elevator Corporation; Snap-on Tools Corporation; Squibb Corporation; Sturm, Ruger and Company; Subaru of America, Inc.; TRW, Inc.; Toyota Motors Sales, U.S.A., Inc.; U-Haul International; Union Carbide Corporation; Unocal Corporation; The Upjohn Company; U.S. Tobacco; USX Corporation; Volkswagen of America, Inc.; Volvo North America Corporation; Vulcan Materials; Jervis B. Webb Company; Whirlpool Corporation; Yamaha Motor Corporation, U.S.A.

cases. In particular, PLAC is vitally concerned about the questions presented by petitioners regarding the trial-court and appellate standards applicable to motions for a new trial on the ground that the jury's verdict represents a miscarriage of justice. Such motions provide a critical safeguard in the legal system for the correction of erroneous and unjustified jury verdicts. PLAC's members have been involved in many product liability and other cases, and they necessarily depend upon the remedy of a new trial to rectify mistakes and abuses in the jury trial process.

Because of PLAC's substantial interest in the outcome of this case, and because of its extensive experience in product liability suits, PLAC is able to provide an additional and broader perspective on the important issues raised by petitioners. PLAC believes that the accompanying *amicus* brief will be of assistance to the Court in considering the petition for a writ of certiorari.

For the foregoing reasons, the motion of the Product Liability Advisory Council, Inc., for leave to file the accompanying brief as *amicus curiae* in support of petitioners should be granted.

Respectfully submitted.

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BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

As explained in more detail in the accompanying motion for leave to file this brief as *amicus curiae*, the Product Liability Advisory Council, Inc. ("PLAC"), is an association of major industrial companies formed for the purpose of filing *amicus* briefs in cases involving significant issues affecting the procedural and substantive law applicable in product liability cases. PLAC and its members have a substantial interest in the questions presented by petitioners: the trial-court and appellate standards applicable to motions for a new trial. Based on its extensive experience in product liability litigation, PLAC believes that its participation as *amicus curiae* in this case will provide an

additional and broader perspective that will be of assistance to the Court in considering the petition for a writ of certiorari.

ARGUMENT

I. THE PETITION PRESENTS IMPORTANT AND RECURRING ISSUES THAT WARRANT THIS COURT'S REVIEW

As the district court recognized, this is a compelling case for the grant of a new trial. The jury's verdict in favor of respondents was contrary to the "great weight of evidence" (Pet. App. 6A), including uncontroverted physical evidence that established that respondents' purported eyewitnesses *could not* have seen the "essential" (*id.* at 5A) fact disputed at trial: whether respondents' van was on the pavement or the unimproved shoulder of the highway when the accident occurred. See *id.* at 5A-6A; Pet. 4-5 & n.2. In addition, although it initially denied petitioners' request for bifurcation of the issues of liability and damages, the district court determined at the conclusion of the trial that the jury had been "obviously swayed by emotion and sympathy" resulting from the "graphic and explicit" evidence of the gruesome injuries suffered by respondent Doug Roy, III; this "emotion * * * pervaded" the case and "overwhelmed the jury, obscuring the issue of liability." Pet. App. 6A.

Accordingly, based on his intimate familiarity with and personal observation of the trial proceedings, the district judge stated that "after much careful consideration, I can only conclude that the verdict is so contrary to common sense and the overwhelming weight of the evidence that I cannot in good conscience permit [it] to remain." Pet. App. 2A. To "allow the verdict to stand" in the face of the great weight of the evidence to the contrary, the court

emphasized, "would constitute a serious miscarriage of justice." *Id.* at 7A. The wisdom of the district court's ruling is confirmed by the outcome of the retrial, at which the jury—after hearing essentially the same evidence on liability, but free from the prejudicial effect of the inflammatory damages evidence—returned a unanimous verdict for petitioners. The court of appeals' reinstatement of the initial verdict thus represents, as the district court found, a "serious miscarriage of justice" and defies both "common sense and the overwhelming weight of the evidence."

Much more is involved here, however, than just the grievous unfairness of the unfounded $3 million judgment against petitioners. Rather, this case presents important and recurring legal issues on which the courts of appeals are deeply divided: the proper relationship between trial courts and juries, and that between trial and appellate courts, in the adjudication of new-trial motions. The petition demonstrates at length the disarray and confusion that mark the lower courts' approach to new-trial issues under Rule 59 of the Federal Rules of Civil Procedure. In particular, "[t]here are few subjects in the entire field of procedure that have been subject to so much change and controversy in recent years as the proper scope of review of an order granting or denying a motion for a new trial." 11 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2818, at 118 (1973).

Under traditional standards, an appellate court's reversal of the grant of a new trial was virtually unprecedented. "In most instances in which trial courts grant a new trial they are right in doing so," and "it does not appear that in more than about one case a year a new trial is granted and the appellate court ultimately reinstates the verdict at the first trial." Wright & Miller, *supra*, § 2803, at 34. See also 6A J. Moore, J. Lucas, and G. Grotheer, MOORE'S FEDERAL PRACTICE ¶ 59.15[3], at

59-303 (2d ed. 1989) (grounds for reversal of district court's new-trial ruling "can rarely be shown"). As the petition shows, however, despite that historical practice appellate courts increasingly are reversing trial judges' rulings on new-trial motions—a trend that is wrong on the merits and of great practical significance to the federal judicial system.

New-trial issues arise routinely in federal litigation (*Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980)), and both sound judicial administration and fairness to litigants require that a uniform standard be established and followed by federal courts around the country. In a variety of cases, this Court has granted certiorari to resolve the legal standards that govern the federal courts' disposition of significant and recurrent procedural issues. See, *e.g.*, *Salve Regina College* v. *Russell*, No. 89-1629 (Mar. 20, 1991); *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922 (1991); *FirsTier Mortgage Co.* v. *Investors Mortgage Insurance Co.*, 111 S. Ct. 648 (1991); *Demarest* v. *Manspeaker*, 111 S. Ct. 599 (1991); *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447 (1990); *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 110 S. Ct. 456 (1989). The need for clarity and national uniformity is as great in this area of the law as it was in each of those areas, and review is equally warranted here.

II. THE NINTH CIRCUIT CLEARLY ERRED IN UNDERTAKING DE NOVO REVIEW OF THE DISTRICT COURT'S EXERCISE OF ITS NEW-TRIAL DISCRETION

As judges and litigators know from common experience, juries are not infallible and, for no evident or explicable reason, sometimes reach unjustified results. Indeed, the principle allowing courts to set aside verdicts as against

the weight of the evidence is premised on the recognition that jurors can go astray and that unsupported verdicts must be corrected if litigation is to be preserved as a fair and rational process for resolving disputes. Thus, the new-trial remedy is inherent in, and in no way inconsistent with, the jury trial system.

> [T]he trial judge does not sit to approve miscarriages of justice. His power to set aside the verdict is supported by clear precedent at common law and, far from being a denigration or a usurpation of jury trial, has long been regarded as an integral part of trial by jury as we know it.

Wright & Miller, *supra*, § 2806, at 49. See also *id.* § 2801, at 28-29, § 2806, at 45; Moore, *supra*, ¶ 59.05[1], at 59-39 (Lord Mansfield stated in 1757 that "[t]rials by jury, in civil causes, could not subsist now without a power, somewhere, to grant new trials") (emphasis omitted), ¶ 59.08[1], at 59-81 ("the trial court's power to grant a new trial is broad and ample to the end that an unjust verdict should not stand; and, when the power is wisely used, it prevents a miscarriage of justice, and makes jury trials instruments of justice, without in the slightest invading the common law function of juries or the constitutional right of jury trial").

Consistent with the historical origins of the new-trial remedy, federal law has long entrusted a special role on such issues to the district judge who presided at the trial and observed the proceedings firsthand. As this Court recently admonished, "[t]he authority to grant a new trial * * * is confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chemical Corp.*, 449 U.S. at 36. See also, *e.g.*, *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 556 (1984) ("[g]enerally, motions for a new trial are committed to the discretion of the district court"); *Cone* v. *West Virginia Paper*

Co., 330 U.S. 212, 218 (1947) ("the primary discretionary responsibility for * * * decision [of a new-trial claim] rests on the District Court"); *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251-252 (1940) ("The motion for a new trial may invoke the discretion of the [district] court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence * * * or that, for other reasons, the trial was not fair to the party moving * * *. [A new-trial motion] appeal[s] to the discretion of the [trial] judge").

This broad discretionary authority reflects the recognition that the district judge is uniquely qualified to assess new-trial issues. Having conducted the trial, "he can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. * * * Determination of whether a new trial should be granted * * * calls for the judgment in the first instance of the judge who saw and heard the witnesses" and therefore has "a perspective peculiarly available to him alone." *Cone*, 330 U.S. at 216. See also, *e.g.*, *United States* v. *Johnson*, 327 U.S. 106, 112 (1946) (the trial judge "had conducted the original trial and had watched the case * * * unfold from day to day," and "[c]onsequently [he] was exceptionally qualified to pass on the [new-trial motion]"); *Salve Regina College*, slip op. 6 (district courts "devote much of their energy and resources to hearing witnesses and reviewing evidence"). The new-trial authority also affords the district judge "an opportunity, after all his rulings have been made and all the evidence has been evaluated, * * * 'to correct his own errors without the delay, expense or other hardships of an appeal.' " *Cone*, 330 U.S. at 216 (citation omitted).

In line with the broad discretion vested in the district court, the scope of appellate review is correspondingly narrow. The court of appeals "review[s] the [d]istrict

[c]ourt's determination under an abuse of discretion standard" and must give "proper deference to the [d]istrict [c]ourt." *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2922 (1989). See also Wright & Miller, *supra*, § 2803, at 32-33 ("the motion invokes the sound discretion of the trial court, and appellate review of its ruling is quite limited"). Underlying this deferential abuse-of-discretion standard is the practical fact that the district judge "has the feel of the case which no appellate printed transcript can impart." *Cone*, 330 U.S. at 216. See also Wright & Miller, *supra*, § 2818, at 119-120 ("there is considerable deference by the appellate court to the action of the trial court" because "[t]he trial judge was on the spot"), § 2819, at 127 ("the appellate court must defer to the better opportunity the trial judge has to appraise the situation"); Moore, *supra*, ¶ 59.05[2], at 59-44 ("the grant or denial of a new trial is primarily addressed to the sound discretion of the trial court, which normally has a feel for the case that an appellate court usually does not have"); cf. *Salve Regina College*, slip op. 8 (deferential abuse-of-discretion review is appropriate both for "issues involving supervision of litigation" and for "mixed questions of law and fact * * * when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine").[1]

Unfortunately, as the petition demonstrates, these pronouncements by the Court have not proven sufficient to restrain some courts of appeals, which subject new-trial

[1] The need for deferential appellate review is reinforced by the fact that district courts are not required to, and often do not, state findings of fact and conclusions of law in ruling on new-trial motions. See *Allied Chemical Corp.*, 449 U.S. at 36 n.3; *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933).

rulings to exacting scrutiny and frequent reversal. In this case the Ninth Circuit expressed the applicable legal standard as follows: "[T]he trial court abuses its discretion in ordering a new trial * * * if the jury's verdict is not clearly against the weight of the evidence." Pet. App. 12B. Thus, the court below did not review—let alone defer to—the district court's exercise of discretion but instead undertook to decide for itself whether the verdict was against the great weight of the evidence. Such a *de novo* appellate determination was fundamentally erroneous. See *Johnson*, 327 U.S. at 113 (the court of appeals does "not sit to try de novo motions for a new trial," and the court "was wrong * * * when it did review the facts de novo").

The court of appeals' error is particularly manifest with respect to the district court's grant of a new trial on the ground of jury sympathy and prejudice. Unlike the court of appeals, which neither saw respondents' injuries nor even had the photographs of those injuries before it (see Pet. 7-8 & n.5), the district court sat through the entire trial, viewed the evidence as it was presented, and, most important, was able to observe the jurors' reactions. Based on this exposure, the experienced trial judge concluded that the jury was "obviously swayed by emotion and sympathy" and that "the emotion * * * overwhelmed the jury, obscuring the issue of liability." Pet. App. 6A. The district court's determination of jury sympathy for respondents and unfair prejudice to petitioners is a paradigmatic example of a new-trial ruling that is peculiarly within the competence of the trial judge. See Wright & Miller, *supra*, § 2818, at 119-120; Moore, *supra*, ¶ 59.15[3], at 59-308. The Ninth Circuit's reinstatement of the jury's verdict in these circumstances is flatly inconsistent with the purposes of Rule 59.[2]

[2] As petitioners explain (Pet. 27 n.12), the court of appeals ignored the distinction between a new-trial motion and a motion for

(Footnote continued on following page)

III. THE NEW-TRIAL PROTECTION AGAINST RUNAWAY JURIES IS ESPECIALLY IMPORTANT IN PRODUCT LIABILITY CASES

The new-trial protection against runaway juries is especially important in product liability and other tort suits. These cases often confront the jury with a severely injured and needy plaintiff, on the one hand, and a "deep pocket," impersonal, and out-of-state corporate defendant, on the other. In choosing between such litigants, the "natural response of the human spirit" is compassion and sympathy for the aggrieved individual. *Richardson* v. *Richardson-Merrell, Inc.*, 857 F.2d 823, 832 (D.C. Cir. 1988), cert. denied, 110 S. Ct. 218 (1989). See also, *e.g.*, *Lynch* v. *Merrell-National Laboratories*, 830 F.2d 1190, 1196 (1st Cir. 1987); United States Dept. of Justice, Tort Policy Working Group, AN UPDATE ON THE LIABILITY CRISIS 54 n.75 (1987) ("DOJ UPDATE") (discussing "deep pocket" jury behavior). While such human empathy is understandable, to allow it to sustain the jury's verdict, despite overwhelming factual evidence supporting the contrary result, is antithetical to the basic precept of the rule of law.

The economic costs of unfounded jury verdicts in product liability cases, as here, have become staggering. In recent years there has been an "extraordinary growth in civil jury awards" in such cases. DOJ UPDATE at 33. See also D. Hensler, TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 18 (Rand/Institute for Civil Justice 1987) (the growth in the average award in product

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[2] *continued*
judgment notwithstanding the verdict. That error typifies "the recurrent tendency on the part of courts to confuse the standard for a new trial with that for a directed verdict or a judgment notwithstanding the verdict. This has * * * consequences * * * [that] are undesirable." Wright & Miller, *supra*, § 2806, at 42. See also Moore, *supra*, ¶ 59.08[5], at 59-142.

liability suits "has been truly explosive, reflecting increases ranging from 200 to more than 1,000 percent"). Today, it is not uncommon for damages awards of millions of dollars—and in some instances tens of millions of dollars or more—to be returned by juries and upheld by courts in product liability actions. See, *e.g.*, P. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 127 (1988).

The enormous costs that grow out of unsupported claims raise profound problems for our nation by adversely affecting consumer welfare and business productivity. Unjustified liabilities clearly "exact[ ] a societal cost in the form of higher insurance premiums and higher product costs." *Mauro* v. *Raymark Industries, Inc.*, 116 N.J. 126, 143, 561 A.2d 257, 266 (1989). Furthermore, not only can such liabilities "add significantly to the cost of a product," but in fact they can completely "drive a vital product or class of products from the marketplace." Epstein & Klein, *The Use and Abuse of Expert Testimony in Product Liability Actions*, 17 SETON HALL L. REV. 656, 661 (1987). See also DOJ UPDATE at 19-20. Thus, " '[i]ronically, the victims of the excesses of the product liability system [are] the consumers, the very persons the system purports to protect.' " E. McGuire, THE IMPACT OF PRODUCT LIABILITY 17 (The Conference Board 1988).

Liability risks also have had a debilitating effect on new product development. A 1988 Conference Board survey of 4,000 companies in the United States found that "potential liability risks" have "had a significant impact on corporate America." McGuire, *supra*, at vii. Indeed, "a third of all the firms surveyed—and nearly half of those reporting major impacts—have decided against introducing new products because of liability fears." *Id.* at 17. In explaining this chilling effect on product development, one CEO noted: "The threat of enormous and unpredictable liabil-

ity continues to weigh heavily in our decisions relating to the development of new products and to improvements to existing ones. * * * As a result, valuable products whose potential profitability is outweighed by the risk of enormous liability never see the light of day." *Id.* at 18.

In sum, this case represents a particularly egregious instance of the much larger systemic problem of runaway juries that the new-trial remedy is designed to correct. Rule 59 is intended to be an essential safeguard against jury verdicts that are against the great weight of the evidence or the product of prejudice and emotion. The Ninth Circuit, however, has rendered that important protection virtually useless. Because, as the petition demonstrates, the lower federal courts are in complete disagreement over what inherently should be a uniform national standard under Rule 59, review by this Court is plainly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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